UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN
GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION OF NON-PARTIES WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY FOR CLARIFICATION OF THE COURT'S ORDER OF 12/8/11

Non-parties, the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald, submit this Civil L.R. 7(h) Non-Dispositive Motion for Clarification of the Court's Order of December 8, 2011.

We are mindful of the Court's December 8th Order and intend to make Mr. Handrick available for deposition at the date and time to be set by what we understand will be Plaintiffs' forthcoming deposition notice. We are also mindful of the Court's admonition to thoroughly review the case cited extensively by the Court in its Order, *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill., Oct. 12, 2011). In light of that case and the Court's ruling, the Senate and Assembly respectfully seek clarification of the Court's ruling as to the scope of inquiry that will be allowed of Mr. Handrick so that the parties can proceed with his deposition without further delay.

Notably, the court in *Committee for a Fair and Balanced Map* only addressed the issue of legislative privilege when discussing whether privileges were waived. The court specifically

noted that it was not considering any issue of attorney-client or work-product privilege and that its decision "does not foreclose" an assertion of other privileges. *Id.*, *36, n.10.

In its order of December 8, 2011, the Court addressed the issue of legislative privilege[1] but also found that attorney-client privilege could not apply to communications between Mr. Handrick and the Senate and Assembly because Mr. Handrick was not providing legal advice. In seeking clarification here as to the permissible scope of discovery of Mr. Handrick under the Court's order, the Senate and Assembly would like to clarify Mr. Handrick's position and role.

This Court correctly noted that Mr. Handrick provided consulting services and not legal advice to the Senate and Assembly. As such, the Senate and Assembly acknowledge the Court's ruling that his communications with the Senate and Assembly would not, without more, be covered by the attorney-client privilege. However, Mr. Handrick is not an attorney, and he is not employed by Michael Best & Friedrich LLP. Mr. Handrick is a Government Relations Specialist employed by Reinhart Boerner van Duren, S.C. The Senate and Assembly, through its outside legal counsel, retained Mr. Handrick as a consulting expert in anticipation of litigation based on his expertise. (*See* McLeod Dec., Exs. 1-3). In this capacity he assisted outside legal counsel for the Senate and Assembly in counsel's provision of legal services related to the redistricting process. (Doc. 64, ¶ 3). It is in this context that the Senate and Assembly argued that discovery should be precluded on grounds of attorney-client and work product privilege.

[1] The Senate and Assembly do note, however, that not all courts have agreed with the broad conclusion in *Committee for a Fair and Balanced Map* that consultation with an expert waives legislative privilege. *See Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1097-98 (Ariz. 2003) (concluding that "a legislator may invoke the legislative privilege to shield from inquiry the acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator") (relying on *Gravel v. United States*, 408 U.S. 606, 618-23 (1972)) (subsequent appeal after remand was vacated on other grounds, *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009)). Notably, although the court in *Fields* found that waiver of the expert's privilege existed, that ruling was based on the fact that the expert in question was designated as a *testifying* expert by the party retaining him. *Id.* at 1102. The court noted that waiver could be avoided by not designating its pre-litigation consultants as testifying experts. *Id.* at 1102.

In their motion to quash Mr. Handrick's subpoena, the Senate and Assembly cited Rules 26(b)(4)(D) and 45(c)(3)(A)(iii) in asserting attorney-client and work-product privileges (as opposed to legislative privilege) because Mr. Handrick was a non-testifying expert who consulted with legal counsel in legal counsel's representation of the Senate and Assembly. In their effort to prepare a timely motion in the two days between their receipt of a copy of the subpoena and the necessary date to file a motion under the Federal Rules, the Senate and Assembly were less than perfectly artful in explaining their position. Because Mr. Handrick is a retained, consulting expert, the Senate and Assembly maintained that, under Rule 26, his opinions and conclusions should be considered work product and not subject to discovery (even if, as the Court has ruled, facts related to his participation in the process are discoverable).[2] *See Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 303 (D. Md. 1992) (concluding that, although an expert consulting in the redistricting process could be subject to fact discovery if he was an active participant in the redistricting process or was not retained in anticipation of litigation, if he "gave advice to the Committee, at the request of the Attorney General's office, concerning the legal implications of the plan under consideration by the Committee, then clearly he will be protected by Rule 26(b)(4) and the attorney-client privilege").

Likewise, as a retained expert, Mr. Handrick's communications with *counsel* for the Senate and Assembly are not properly discoverable. *See Estate of Chopper v. R. J. Reynolds*

[2] Respectfully, the Senate and Assembly maintain that the fact that they are not parties to this matter should not render their right to expert work-product protection unavailable. Whether they were, in fact, named as parties is not dispositive of whether they retained Mr. Handrick in anticipation of litigation. *See, e.g., Equal Rights Ctr. v. Post Props., Inc.*, 247 F.R.D. 208, 210-11 (D. D.C. 2008) (party can create documents "in anticipation of litigation" before litigation ensues, so long as there was a "a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable"). The Senate and Assembly correctly surmised that litigation from their redistricting efforts would ensue. It was in anticipation of such litigation that Mr. Handrick was retained. The Senate and Assembly do not believe that work-product protection is unavailable *before* litigation against them actually results. Indeed, because the Wisconsin government is divided into three branches and because the executive branch enforces laws enacted by the legislative, it is not surprising that work product generated in anticipation of litigation over legislation would be generated by a branch of the government that is not named as a party.

Tobacco Co., 195 F.R.D. 648, 651-52 (N.D. Iowa 2000) (attorney work product, even when shared with a testifying expert, "has nearly absolute immunity from discovery").

We understand the Court's ruling that facts which Mr. Handrick possesses regarding the redistricting process are discoverable in this action, and the Senate and Assembly intend to produce Mr. Handrick for deposition as the Court has directed. Although we have not yet received confirmation of the date on which Plaintiffs intend to depose Mr. Handrick, we understand that it will be either Tuesday, December 20; Wednesday, December 21; or Thursday, December 22. The Senate and Assembly respectfully seek this clarification as to the proper scope of discovery that will be permitted of Mr. Handrick so that the deposition can proceed accordingly under that scope and without further delay during the course of the deposition itself.

Dated this 13th day of December, 2011.

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